

MF 07-4

Tax Type: Motor Fuel Use Tax

Issue: Book And Records Insufficient

**STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
SPRINGFIELD, ILLINOIS**

**THE DEPARTMENT OF REVENUE
OF THE STATE OF ILLINOIS**

v.

JOHN DOE

Taxpayer

Docket # 06-ST-0000

Acct # 000000000000

Tax Type: IFTA

RECOMMENDATION FOR DISPOSITION

Appearances: Kent Steinkamp, Special Assistant Attorney General, for the Department of Revenue of the State of Illinois; Mark M. Silvermintz of The Kunin Law Offices, LLC for JOHN DOE.

Synopsis:

The Department of Revenue (“Department”) conducted an audit of the company owned by JOHN DOE (“taxpayer”) for the time period of April 2003 through December 2004. The audit was conducted to determine compliance with the Motor Fuel Tax Act (“Act”) (35 ILCS 505/1 *et seq.*) and the International Fuel Tax Agreement (“IFTA”). The records that the taxpayer provided to the auditor were not sufficient to adequately conduct the audit, and the auditor determined the liability based on the best information that he had available to him. The Department issued a Notice of Audit Tax Liability

(“Notice”) to the taxpayer, and the taxpayer timely protested the Notice. An evidentiary hearing was held during which the taxpayer presented testimony from his accountant concerning an alternative method for calculating the liability. After reviewing the evidence presented, it is recommended that this matter be resolved in favor of the Department.

FINDINGS OF FACT:

1. The taxpayer operates a repair shop and owns one truck that he drives between Missouri and Illinois. (Dept. Ex. #3)
2. The taxpayer is required to file MFUT-15, IFTA Quarterly Return, for each quarter. (Dept. Ex. #5; Tr. pp. 13-14)
3. On the MFUT-15, the taxpayer must report all the jurisdictions through which he traveled. The taxpayer must also report the total taxable miles that his truck traveled in each jurisdiction and the number of gallons of fuel that he purchased in each State. (Dept. Ex. #5; Tr. pp. 14-16)
4. In computing the tax on the MFUT-15, the taxpayer must take the total taxable miles that were driven in all jurisdictions and divide that by the total number of tax-paid gallons of fuel that were purchased and arrive at a miles per gallon (“MPG”) figure. (Dept. Ex. #5; Tr. pp. 16-17)
5. After determining the MPG, the taxable miles for each separate jurisdiction are then divided by the overall MPG figure to determine the amount of gallons consumed in each jurisdiction. (Dept. Ex. #5; Tr. p. 17)
6. The total number of gallons that were purchased in each State is subtracted from the number of gallons consumed in each State to determine the net taxable gallons

- consumed in each State. This amount is multiplied by the tax rate to determine the amount of tax that is due or the amount of refund that is owed. The tax and refund are distributed to each jurisdiction. (Dept. Ex. #5; Tr. pp. 17-20)
7. The Department conducted an audit of the taxpayer's business for the periods covering the second quarter of 2003 through the fourth quarter of 2004. (Tr. pp. 8-9)
 8. The auditor asked the taxpayer for mileage and fuel records to perform the audit. The taxpayer gave the auditor a small number of invoices and some scratch paper with some odometer readings or mileage figures. The taxpayer told the auditor that he had made up the figures to put on the tax return. (Dept. Ex. #3; Tr. pp. 12, 31)
 9. The auditor sent the taxpayer a letter demanding that the business records be produced within 60 days, and the taxpayer did not respond to the letter. (Dept. Ex. #2, 3; Tr. p. 21)
 10. The auditor did not have sufficient information to verify the miles that were reported. The auditor accepted all of the miles that were reported as correct and did not make an adjustment to the miles that were reported on the returns. (Tr. pp. 31, 39)
 11. To determine the amount of gallons that were purchased, the auditor used a standard of four miles per gallon pursuant to the Department's regulation concerning audits (86 Ill. Admin. Code §500.360(c)). (Dept. Ex. #3; Tr. p. 26)

12. Using the standard of 4.0 MPG, the auditor calculated the number of gallons consumed in each jurisdiction and determined the tax owed to each jurisdiction.
(Dept. Ex. #3)
13. On December 26, 2005, the Department issued a Notice of Audit Tax Liability to the taxpayer showing additional tax due in the amount of \$18,287.01, plus interest and penalty. The Notice was admitted into evidence under the Certification of the Director. (Dept. Ex. #1)
14. After the audit, the taxpayer obtained invoices from one of his suppliers for his fuel purchases for the fourth quarter of 2004. (Tr. p. 49)
15. The supplier's invoices for the fourth quarter of 2004 included the number of gallons purchased, the price per gallon, and the total cost of the fuel. The supplier provided the taxpayer with all of the taxpayer's invoices for the sales in November and December and for some of the October sales. (Taxpayer Ex. #2, 3, 4, 5; Tr. p. 54)
16. For the remaining October sales, the supplier gave the taxpayer a copy of a handwritten ledger that listed the dates that the purchases were made and the total cost of the fuel. The ledger did not include the number of gallons purchased or the price per gallon. (Taxpayer Ex. #3; Tr. pp. 66-67)
17. The taxpayer's accountant, who is also a CPA, estimated the average price per gallon for the October purchases by using the other October invoices that had the price per gallon listed on them. After computing the average price per gallon, the accountant used this amount to determine the number of gallons purchased for the October sales that were listed on the ledger. (Tr. pp. 54-55)

18. From these figures, the accountant was able to estimate the total number of gallons purchased during the fourth quarter of 2004. His estimate was 14,291.809 gallons. (Taxpayer Ex. #2; Tr. pp. 55-56)
19. The accountant used the total number of gallons for the fourth quarter of 2004 to estimate the total gallons purchased during the audit period by multiplying the gallons purchased in the fourth quarter by the number of quarters during the audit period.¹ (Tr. p. 56)
20. The accountant used his estimate of the total gallons purchased to determine the average miles per gallon, which he calculated to be 5.2. (Taxpayer Ex. #2)
21. Using the 5.2 MPG, the accountant estimated the taxpayer's additional liability to be \$8,565.40. (Taxpayer Ex. #2; Tr. p. 59)

CONCLUSIONS OF LAW:

Section 13a.2 of the Act provides, in part, as follows:

Each motor carrier shall keep records which accurately reflect the type and number of gallons of motor fuel consumed, the number of miles traveled with each type of fuel on the highways of each jurisdiction and the highways of Illinois, the type and number of gallons of tax paid fuel purchased in this State, and every jurisdiction, and the number of miles traveled and the amount of fuel consumed on the highways of this State and every jurisdiction. * * * In the absence of such records, the Department shall presume that one gallon of fuel is used for each 4.0 miles traveled in this State. 35 ILCS 505/13a.2.

The Department's regulation concerning records contains similar requirements and provides, in part, as follows:

(e) Fuel records shall contain the following items:

- 1) the date of each receipt of fuel;

¹ According to the auditor's report, the second quarter of 2003, which was the first quarter of the audit period, did not have any purchase activity. The accountant did not include this quarter in his estimate. (Tr. p. 52)

- 2) the name and address of the person from whom purchased or received;
 - 3) the number of gallons received;
 - 4) the type of fuel; and
 - 5) the vehicle or equipment into which the fuel was placed.
- (f) All licensees shall, in addition, maintain detailed distance records which show operations on an individual-vehicle basis. Such records shall contain but not be limited to:
- 1) both taxable and non-taxable usage of fuel;
 - 2) distance traveled for taxable and non-taxable use; and
 - 3) distance recaps for each vehicle for each jurisdiction in which the vehicle operated. 86 Ill. Admin. Code §500.345(e), (f).

The Department's regulation concerning audits provides, in part, as follows:

Audits will be completed using the best information available. In the absence of adequate records, a standard of four miles per gallon will be used. Tax-paid fuel entries will be disallowed if tax-paid fuel documentation is unavailable. All reasonable attempts will be made to verify reported miles. 86 Ill. Admin. Code §500.360(c).

Section 21 of the Act incorporates by reference section 5 of the Retailers' Occupation Tax Act (35 ILCS 120/1 *et seq.*), which provides that the Department's determination of the amount owed is *prima facie* correct and *prima facie* evidence of the correctness of the amount due. 35 ILCS 505/21; 120/5. Once the Department has established its *prima facie* case, the burden shifts to the taxpayer to prove by sufficient documentary evidence, identified with his books and records, that the assessment is incorrect. Copilevitz v. Department of Revenue, 41 Ill. 2d 154 (1968); Mel-Park Drugs, Inc. v. Department of Revenue, 218 Ill. App. 3d 203, 217 (1st Dist. 1991); Lakeland Construction Co., Inc. v. Department of Revenue, 62 Ill. App. 3d 1036, 1039 (2nd Dist. 1978).

The taxpayer contends that he has overcome the presumptive correctness of the Department's return by presenting the invoices from his supplier. The taxpayer states that he has produced the actual figures for the amount of fuel consumed during the fourth

quarter of 2004, and the auditor accepted the number of miles that he traveled. Using this information, the taxpayer estimated a MPG figure that is higher than the one used by the Department, which resulted in a lower tax liability. The taxpayer, therefore, admits that he owes additional tax to the Department, but he argues that it is not as much as the Department contends that he owes. The taxpayer also argues that although the invoices were not obtained until after the audit, the hearing process would be meaningless if he were not allowed to subsequently bring in records to support his claim.

The Department argues that the auditor performed the audit according to the regulation, and the documents that the taxpayer now relies upon were not produced during the audit. The Department contends that one of the sanctions for failing to keep adequate records is that the 4.0 MPG figure will be used. The Department believes that the purpose of the hearing process is to correct any mistakes that may have been made or to challenge the interpretation of a regulation. The Department asserts that the regulation is clear and the auditor did not make any mistakes when he used the 4.0 MPG figure.

The evidence that the taxpayer presented in this case is not sufficient to overcome the Department's *prima facie* case. As the Department has indicated, the auditor correctly used the 4.0 MPG to determine the taxpayer's liability. In response, the taxpayer has not presented documents identified with his books and records to show that the Department's determination is incorrect. Instead, the taxpayer presented a small number of invoices from one of his suppliers.

The invoices presented are not enough to disregard the Department's determination. The taxpayer did not provide invoices for the entire audit period, and the invoices that were provided for the fourth quarter of 2004 are not complete. The

taxpayer's accountant testified that the supplier kept "very, very shoddy records." (Tr. p. 66) For nearly half of the October purchases, the supplier's invoices were not available. For the sales that did not have an invoice, the taxpayer used a handwritten ledger from the supplier that listed the dates of the purchases and the total cost of the purchase.² The accountant estimated the price of the October purchases for which there was no invoice and then estimated the amount of fuel purchased in October. The accountant used that amount to estimate the total amount of fuel purchased during the audit period. Although the taxpayer claims to have provided actual figures, he has only provided estimates for both the fourth quarter of 2004 and for the entire audit period.

In addition, the invoices are from only one supplier. (Taxpayer Ex. #3, 4, 5) It is not clear from the record that they represent all of the taxpayer's fuel purchases or that this was the only vendor from which the taxpayer purchased fuel during the time in question. All of the invoices have "Station: 1" on them, and although it is possible that the taxpayer purchased all of his fuel from one station, there was no competent evidence to support this conclusion.

In Mel-Park Drugs, *supra*, the taxpayer did not provide the auditor with adequate records to determine the liability. The taxpayer did not have daily sales receipts or daily cost records, but only provided monthly summaries that did not establish the character of every transaction. The auditor estimated the liability based upon the best information that was available to her, and the taxpayer argued that the auditor's estimate was unreasonable because she did not use a markup method that the Department had used in other cases. The court stated that when a taxpayer has failed to produce adequate records, the

² Although an objection was not made concerning the admissibility of the handwritten ledger or the invoices, the taxpayer did not establish the basic credibility of these documents.

Department may use the markup practice in calculating the tax. The court declined, however, to apply the same rule in reverse and require the Department to use the markup method on the taxpayer's demand. The court stated that "[s]uch a rule would reward the taxpayer's failure to maintain adequate records." Mel-Park Drugs at 216.

In the present case, the taxpayer's records were not only inadequate, they were non-existent, and accepting the taxpayer's estimate would reward the taxpayer's failure to maintain records. Under the Act, the taxpayer is required to maintain records that reflect the number of miles driven in each jurisdiction and the number of gallons that were purchased. This record-keeping requirement is not onerous, yet the taxpayer disregarded this requirement and admitted to the auditor that he simply made up the figures that he reported on his quarterly returns.

In order to estimate the audit liability, the auditor used the taxpayer's mileage figures because he had no way to verify the actual miles that were driven. With respect to the number of gallons that were consumed, when adequate records are not available, section 13a.2 of the Act requires the Department to presume that one gallon of fuel is used for each 4.0 miles traveled. (35 ILCS 505/13a.2) The auditor correctly used this presumption to determine the liability. Nothing indicates that his calculations were inaccurate.

The method that the taxpayer has proposed for calculating the liability is not based on the taxpayer's books and records and is simply an alternative method for estimating the liability. The invoices presented during the hearing cannot be considered to be adequate because they do not cover the entire audit period and it is not clear whether they represent all of the taxpayer's purchases even for the months of November

and December 2004. The taxpayer has not provided documents showing the actual number of gallons purchased during the period in question, and the Department is not required to use the taxpayer's alternative method for estimating the liability. The Department's determination must, therefore, be upheld.

Recommendation:

For the foregoing reasons, it is recommended that the Notice of Audit Tax Liability be upheld.

Linda Olivero
Administrative Law Judge

Enter: February 27, 2007